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Nos. 85-1377, 85-1378, 85-1379

In the

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES,
APPELLANT,
v.
MIKE SYNAR, MEMBER OF CONGRESS, ET AL.,
APPELLEES

UNITED STATES SENATE,
APPELLANT,
v.
MIKE SYNAR, MEMBER OF CONGRESS, ET AL.,
APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
APPELLANTS,
v.
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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Brief of Amicus Curiae Edward Blankstein

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CASES

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Arizona v. California, 373 U.S. 576 (1963) 13

Buckley v. Valeo, 424 U.S. 1 (1976) 14, 15

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Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983) *passim*

Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607 (1980) 12, 13, 19

J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) 11, 17n

McCulloch v. Maryland, 17 U.S. 316 (1819) 17n

Myers v. United States, 272 U.S. 52 (1926) 28

National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) 13, 16, 17n

Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Division, 312 U.S. 126 (1941) 11

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 13
Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928) 17n
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 15, 20, 23n

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National Direct Student Loan Program 20 U.S.C. 1087aa 2
College Work Study Program 42 U.S.C. 2751 2, 7, 8, 9

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CONGRESSIONAL MATERIAL

131 Cong. Rec. H10599 (December 3, 1985) 22
131 Cong. Rec. H10803 (December 4, 1985) 21, 22
131 Cong. Rec. S17401 (December 11, 1985) 20
131 Cong. Rec. S17403 (December 11, 1985) 5n
131 Cong. Rec. S17404 (December 11, 1985) 9, 18, 24
131 Cong. Rec. S17405 (December 11, 1985) 24n
131 Cong. Rec. S17408 (December 11, 1985) 23
131 Cong. Rec. S17443 (December 11, 1985) 23n
132 Cong. Rec. E 1006-1008 (April 8, 1986) 9
Hearing, The Balanced Budget & Emergency Deficit Control Act of 1985, 99 Cong., 1st Sess. 137 (October 17, 1985) 7n, 28
H.R. Doc. No. 99-160, 99 Cong. 2d Sess. 314 (1986) 2n
H.R. Rep. 95-105, 95th Cong. 1st Sess., reprinted in 1 U.S. Cong. & Ad. News 41, 53 (1977) 19, 21n
H.R. Rep. 99-383, 99 Cong. 1st Sess. 6 (1985) (H.R. 3700, the Higher Education Amendments of 1985) 3n, 21, 22, 23
H.R. Rep. 99-433, 99 Cong. 1st Sess. 83 (1985) 7
S. 1965, 99 Cong., 1st Sess. (1985) 21

ADMINISTRATIVE MATERIALS

Notification to Members of Congress Regarding P.L. 89-239, as amended, Campus Based Programs, Rep. No. 85-1 (May, 1984) 8
Sequestration Report for Fiscal Year 1986 — A Joint Report to the Comptroller General of the United States, 51 Fed. Reg. 1917 (1986) 2n

United States General Accounting Office, Budget Reductions for Fiscal Year 1986, Report to the President and the Congress, 51 Fed. Reg. 2811 (1986) ("GAO Report") *passim*

MISCELLANEOUS

Broder, The Rudman-Gramm Balanced Budget Sham, The Washington Post, December 11, 1985 23

Ely, Democracy and Distrust (1980) 12, 13, 14n, 15, 19n

Goldsmith, Immigration & Naturalization Service v. Chadha And The Nondelegation Doctrine: A Speculation, 35 Syracuse L. Rev. 749 (1984) 15, 16n

Levi, Some Aspects of Separation of Powers, 76 Columbia L. Rev. 371 (1976) 18n

Madison, The Federalist 58 (Van Doren ed. 1945) 16

McGowen, Congress, Court, and Control of Delegated Power, 77 Colum. L. Rev. 1119 (1977) 12

New York Times Article, February 21, 1986 18n

President's Budget Message for Fiscal Year 1987. H.R. Doc. No. 143, OMB, Budget of the United States government: Fiscal Year 1987, 99 Cong., 2d Sess. (1986) 25, 26

Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 83 Mich. L. Rev. 1223 (1985) 12, 15

Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975) 12

Tribe, American Constitutional Law (1978) 5, 13, 14, 20n

Tribe, The Legislative Veto Decision: A Law By Any Other Name?, 21 Harv. J. on Legis. 1 (1984) 15

W. Wilson, Congressional Government: A Study in American Politics (1956) 18n

Wright, Beyond Discretionary Justice, 81 Yale L.J. 575 (1972) 12n, 13, 15

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Brief of Amicus Curiae Edward Blankstein

Interest of Amicus Curiae

Mr. Edward Blankstein of Princeton, New Jersey, *amicus curiae*, serves as Director of Student Financial Aid at post-secondary educational institutions in 22 states in all areas of

the country. At each of those institutions, he is responsible for the administration of Student Financial Assistance programs under Title IV of The Higher Education Act of 1965, as Amended, 20 U.S.C. 1001, *et seq*.

In his capacity as Director of Student Financial Aid, Mr. Blankstein processes over 30,000 individual student applications each year under the Title IV Student Financial Assistance programs he administers. These programs include the National Direct Student Loan Program, 20 U.S.C. 1087aa, the College Work-Study Program, 42 U.S.C. 2751, the Supplemental Educational Opportunity Grant Program, 20 U.S.C. 1070b, the Pell Grant Program, 20 U.S.C. 1070a, and the Guaranteed Student Loan Program, 20 U.S.C. 1071.

For fiscal year 1986, the Title IV programs suffered a cut of $210.141 million under the Balanced Budget and Emergency Deficit Control Act of 1985 ("the Act"), Pub. L. No. 99-177, 99 Stat. 1037; J.A. 103.[1]

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[1] The $210.141 million dollar cut was specified in the Sequestration Report for Fiscal Year 1986–A Joint Report to the Comptroller General of the United States, 51 Fed. Reg. 1917 (1986). It remained unchanged in the Comptroller General's Report. United States General Accounting Office, Budget Reductions for FY 1986, Report To The President And The Congress ("GAO Report"), 51 Fed. Reg. 2811 (1986).

The Guaranteed Student Loan Program is governed by special rules set out in the Act. Act § 256(c); J.A. 150-151.

On February 1, 1986, the Secretary of Education transmitted to the Speaker of the House of Representatives a report specifying the effect of the Act on each program, project or activity of the Department of Education. H.R. Doc. No. 99-160, 99 Cong. 2d Sess. 314 (1986). The Secretary reported the following:

Program, Project, Activity	Budgetary Resources ($000) Base	Sequester
1. Pell grants	$3,588,000	$154,284
2. Supplemental educational opportunity grants	412,500	17,738
3. Work-study	592,500	25,477
Direct Loans:		
4. Federal Capital contribution	190,000	8,170
5. Teacher/military cancellations	28,000	1,204
6. State student incentive grants	76,000	3,268
TOTAL	$4,887,000	$210,141

Id. at 327.

The future of these programs, and of our nation's youth for whom they were designed, is seriously imperilled by the drastic cuts in funding mandated by the Act. As a result, America's twenty-year commitment to making higher education available to all who demonstrate the motivation and the willingness to learn may be reversed without requiring members of Congress to cast a single vote.

The *amicus*' concern is with continued vitality of the Title IV Student Financial Assistance programs, programs that will continue to be adversely affected by spending cuts mandated in future fiscal years by the Act.[2] Moreover, as a veteran of the legislative process that resulted in the initial passage of Title IV and every reauthorization of and amendment thereto, Mr. Blankstein is aggrieved by the manner in which the Act insulates from public input the budgetary policy decisions constitutionally entrusted to our elected representatives in the legislative branch.

Edward Blankstein files this brief on behalf of himself, students, potential students, parents, faculty, school administrators and others who have been or will be harmed by cuts in Title IV funding in the aftermath of the Act, and who wish to preserve the tradition of governmental accountability to the electorate for fiscal policy decisions so firmly grounded in the U.S. Constitution. As *amicus*, Mr. Blankstein respectfully urges this Court to find the Act unconstitutional on its face.

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[2] The *amicus* is also concerned that the implementation of the Act provides no forum in which to address the financial crisis facing higher education in the United States. The Report of the House Education and Labor Committee which accompanied H.R. 3700, The Higher Education Amendments of 1985, states as follows:

> In constant dollars, the value of student aid declined by 21 percent between the 1980-81 school year and the 1984-85 school year. Of particular significance is the fact that in fiscal year 1979 the maximum Pell Grant award represented 46 percent of the average cost of attendance at all postsecondary institutions in the United States. In the academic year 1984-85, the maximum Pell Grant award provided only 26 percent of the average cost of attendance. In short, while the value of all federal student aid declined by one-fifth, the purchasing power of the primary federal grant program decreased by nearly one-half.

H.R. Rep. 99-383, 99 Cong. 1st Sess. 6 (1985).

Summary of Argument

Edward Blankstein, *amicus curiae* on behalf of appellees Synar, et al., respectfully contends that the Act fails to comport with fundamental principles that underlie the Constitution's separation of powers. The Act institutionalizes a method of law-making that abrogates the commands of the Bicameralism and Presentment Clauses of Art. I, § 7 of the Constitution, as those clauses were recently explicated by this Court in *Immigration & Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983). Moreover, although in agreement with the result reached by the district court, the *amicus* believes that this Court should confront the question of whether the challenged statute exceeds the proper scope of Congress' ability to delegate its enumerated powers to independent and executive agencies. The delegation doctrine was designed to protect and further two major separation of powers principles: the dispersement of sovereign authority and governmental accountability to its citizens. The abdication of Congressional control over the federal budget, as contemplated by the Act, constitutes a direct challenge to those principles, one which the *amicus* respectfully urges that this Court not countenance.

Argument

I. The Act Unconstitutionally Evades the Bicameralism and Presentment Clauses of Article I, § 7, Cl. 2 of the United States Constitution.

In *Immigration & Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), this Court emphatically reaffirmed "the Framers' decision that the legislative power of the federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." 462 U.S. at 951. In striking down the legislative veto, the device by which Congress had long sought to maintain control over executive and independent agency decisions made pursuant to delegations of leg-

islative power, this Court did no more than explicate the obvious: the procedural requirements of Article I represent a substantive judgment made by the Framers that the power of government demands careful control. The Bicameralism and Presentment mandates of Art. I, § 7 serve the essential purpose of ensuring that before the Federal Government can undertake actions that affect individual rights or needs, such actions must receive consideration from both Houses of Congress and two branches of government. *Id.* at 947-950; *See* Tribe, American Constitutional Law, § 2-2 (1978).

Continued respect for the Framers' logic mandates invalidation of the Act. The results contemplated by the Act have the intended "purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," *Chadha*, 462 U.S. at 952, thus bringing it squarely within the holding and meaning of that case.

The Act purports to bring fiscal stability to the federal budget process. Faced with a deficit of over $200 billion, a national debt fast approaching $2 *trillion*, and a perceived inability to agree on the proper methods for either creating new sources of revenue or reducing government spending, Congress chose to outlaw the deficits themselves.[3] Accordingly, the Act sets a "maximum deficit amount," for each of the fiscal years 1986 through 1991, progressively eliminating equal amounts of budgetary excess (excluding fiscal year 1986) until reaching the level of zero in fiscal year 1991. Act § 201(a)(1); J.A. 103-104. To ensure the attainment of the stated levels, the Act creates an automatic mechanism that triggers spending reductions when Congress and the President fail to reach agreement on a budget that meets the Act's requirements. Act §§ 251, 252; J.A. 109, 124. The Act provides that each year (beginning August 15, except for fiscal year 1986), the Office of Management and Budget ("OMB"), an executive agency, and the Con-

[3] As aptly described by the Act's co-sponsor, "I said several months ago that it was a bad idea whose time had come. I meant simply that it is a shame that we face this alternative of essentially adopting institutional courage by statute. But that is precisely what it has come to." 131 Cong. Rec. S17403 (December 11, 1985) (Statement of Sen. Rudman).

gressional Budget Office ("CBO"), shall estimate the size of the deficit for the upcoming fiscal year. Act § 251(a)(1); J.A. 109. Within five days from this "snapshot" date, the two agencies must issue a joint report to the General Accounting Office ("GAO"). Act § 251(a)(1), (2); J.A. 109-110. The report issued to the GAO must contain OMB and CBO estimates of the deficit, and, if in excess of the maximum deficit amount for that fiscal year by more than a specified figure, their calculations for spending reductions pursuant to rules specified in the Act which purport to provide an evenhanded and proportionate sharing of the burden throughout the federal budget. Act § 251 (a)(3) and (4); J.A. 110-115. Section 251(a)(5) of the Act states that where the two agencies are unable to agree on a particular estimate necessary to calculate the budget base, or on a certain program reduction amount, "they shall average their differences to the extent necessary to produce a single, consistent set of data that achieves the required deficit reduction." J.A. 115.

Within five days of receiving the joint report, the Comptroller General must issue his own report to the President and Congress, detailing his own deficit estimates and budget reduction calculations. Act § 251(b)(1) and (2); J.A. 116-118. The Act then commands the President to issue a "sequestration" order within one week of receiving the report, implementing the budget reductions specified by the Comptroller General. Act § 252(a); J.A. 124-132. The sequestration order takes effect exactly one month after its issuance. Act § 252(a)(6)(A) and (B); J.A. 129. Within that time, Congress may agree upon its own sequestration order so as to meet the dictates of the Act, subject to Presidential veto. Act § 254(b) and (c); J.A. 139-142.

The Act divides Federal spending into two categories: defense, and non-defense, between which all necessary reductions are to be divided equally. Act § 251(a)(3); J.A. 110. Within each category, up to one half of the reduction may be achieved from the elimination of "automatic spending increases." *Id.* The remainder is to be derived from sequestering amounts on a uniform percentage from each account within

the non-defense category, and on the program, project, and activity ("PPA") level for each account within the defense category. Act § 251(a); J.A. 109-116.[4] For non-defense accounts, sequestration shall occur at the PPA level "as set forth in the most recently enacted applicable appropriations acts and accompanying committee reports. . . For programs which are not defined at the program, project or activity level, the sequestration would be applied at the account level." H.R. Rep. 99-433, 99th Cong. 1st Sess. 83 (December 10, 1985).

The issue presented is whether, in light of *Chadha*, the effects of the Act derive from a permissible method of law-making. The Act, as written, superficially addresses these concerns. Section 252(d) of the Act explicitly states, "No action taken by the President under . . . this section shall have the effect of eliminating any program, project, or activity of the Federal Government." J.A. 134. Even short of this extreme effect, however, the cuts demanded by the Act may modify or destroy the effectiveness of existing legislation in a manner that violates the Bicameralism and Presentment Clauses of Article I, § 7, and thus cannot survive constitutional scrutiny.[5]

Implementation of the Act's mandatory budget cuts raise a series of unaddressed practical and constitutional difficulties that may be highlighted by examining the case of the College Work-Study Program, 42 U.S.C. 2751 et seq. ("CWS"), a program of particular interest to the *amicus*.

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[4] The sequestration order in effect for fiscal year 1986 mandates cuts of 4.9% for defense programs, and 4.3% for non-defense programs. GAO Report, 51 Fed. Reg. 2811, 2862-2863 (1986).

[5] *See*, Hearing, *The Balanced Budget and Emergency Deficit Control Act of 1985*, Before a Subcommittee of the Committee on Government Operations, 99th Cong., 1st Sess. 137 (October 17, 1985) ("Hearing") (testimony of Charles Bowsher, Comptroller General):

> MR. FUQUA. [Could] not programs under sequestration be cut so much that they would, in effect, have to be eliminated?
>
> MR. BOWSHER. I think if our numbers get large enough and you make deep cuts in a small portion of your budget, sure, that's where you can end up.
>
> MR. FUQUA. So they could be affected.
>
> MR. BOWSHER. They could be affected to the point that you don't have an effective program. That's exactly right.

In fiscal year 1986, the Act mandated a $25.477 million spending reduction of previously appropriated CWS funds. See n.1, *supra*. The average CWS student award was approximately $675.00 for the fiscal year that ended June 30, 1985. Notification to Members of Congress Regarding P.L. 89-239, as amended, Campus Based Programs, Report No. 85-1, May, 1984 at p. 383. While the Act purports to prohibit the elimination of any program in its entirety, Act § 252(d); J.A. 134, it permits and even requires unaccountable bureaucrats to determine that tens of thousands of our nation's college students will get no College Work-Study funding. For those students, the program has been eliminated. Such a wholesale modification of this crucial program is a legislative function and must, under *Chadha*, comport with the requirements of Article I, § 7 of our Constitution.

The CWS program is a campus-based program in that the Secretary of Education is required to make institutional allotments which the participating institutions then distribute to their students based on financial need. 42 U.S.C. 2751-2756; 34 C.F.R. §§ 675.12, 675.13 (1985). The institutional allotments are computed in three stages: a conditional guarantee which ensures a minimum level of allocation, 34 C.F.R. § 675.6 (b) (1985), a state increase based on the institution's fair share of the state apportionment, 34 C.F.R. § 675.6(f) (1985), and a national increase based on the institution's fair share of the national appropriation, 34 C.F.R. § 675.6(g) (1985).

The Act does not specify whether, to what extent, or in what proportions the Secretary of Education must apply the reductions mandated by a sequestration order to an institution's conditional guarantee, its state fair share and its national fair share. The superficial and anonymous nature of the sequestration process does not include or permit any consideration of the interrelationship among the elements which form the basis for the institution's allotment under the CWS program. It also precludes any examination of the impact of the mandated spending cuts, setting the stage for an anomalous and inequitable sharing of the budget cutting burden among institutions which participate in the CWS program.

The results of this executive branch law-making are truly startling when viewed in light of the "across the board" 4.3% reduction in domestic spending mandated by the Act for fiscal year 1986. See n.4, *supra*. The *amicus* respectfully directs the Court's attention to an examination of the effects of the Act's fiscal year 1986 sequestration order on institutions located in the State of New Jersey: the Wilfred Academies of New Jersey, for which the *amicus* serves as Director of Student Financial Aid, have suffered a 10.98% reduction in the tentative CWS allocations for the 1986-1987 award year as a result of the Act; Hudson County Community College of Jersey City, New Jersey received a cut of 22.41%; and the Institute of Business and Technology of Newark, New Jersey found its 1986-1987 CWS allocation cut 23.85% due to the Act. At the same time, Princeton University of Princeton, New Jersey and Rutgers-State University of New Brunswick, New Jersey, institutions which together have a combined CWS allocation in excess of $3,000,000.00, suffered *no* reductions at all this time around. *See* 132 Cong. Rec. E 1006-1008 (April 8, 1986). Are these the kind of modest and even-handed cuts that the sponsors of the Act promised to the public?

The sequestration process cannot be analogized to agency rules promulgated pursuant to a lawful delegation of Congressional power. As this Court made plain in *Chadha*, "[Agency] action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of [agency] action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." 462 U.S. at 953-954 n.16. The Act satisfies neither of those requirements. Indeed, the idea of Congressional control is antithetical to the Act's fundamental purpose, which is to remove the budget process from legislative control. *See* 131 Cong. Rec. S17404 (December 11, 1985) (Statement of Sen. Rudman). Once a sequestration order is issued, the deficit totals in the Comptroller General's

report become final, and Congress can do nothing to alter them. Act § 254(b)(1)(E); J.A. 134. Further, the Act explicitly precludes any judicial review of the "economic data, assumptions, and methodologies used . . . in computing the base levels of total revenues and total budget outlays." Act § 274(h); J.A. 162. The absence of these two factors thus brings the sequestration process squarely within the type of law-making that must, under *Chadha*, comport with the constitutional requirements of Art. I, § 7 of the Constitution.

It would be truly anomalous for this Court, after striking down the legislative veto, to uphold this exceptionally broad and unwieldy exercise of legislative authority, authority that will ultimately cause the negation of Congressional action without even the one-house review that the legislative veto required. The sequestration process, like the legislative veto, no doubt offers expediency and convenience in place of the long and sometimes arduous process of enacting a federal budget. The inevitable ramifications of those cuts, however, powerfully reinforce this Court's conclusion in *Chadha*: "With all the obvious flaws of delay [and] untidiness, . . . we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." 462 U.S. at 959.

If the Congress determines that the public interest requires the elimination of the deficit, it may do so through any combination of increased revenues and decreased outlays. The Constitution requires only that these choices be made in accordance with the legislative process as set forth in Article I of the Constitution.

II. The Act Directly Contravenes Important Separation of Powers Principles That the Delegation Doctrine Was Designed to Protect.

The doctrine limiting delegation of Congressional power to executive and independent agencies ("the delegation doctrine") has theoretical origins in the principle of separation of powers, one of the cornerstones of the United States Constitution.

In practice, however, defining the permissible scope of such delegation poses a dilemma. This Court has necessarily recog-

nized the institutional limitations of Congress and countenanced wide delegation of power, both to permit effective statutory implementation and to ensure that Congress not become overwhelmed to the point where it could no longer perform its required functions. *See, Opp Cotton Mills, Inc.* v. *Administrator of Wage & Hour Div.*, 312 U.S. 126, 145 (1941). Nonetheless, adherence to the principles of dispersement of sovereign authority and governmental accountability to the electorate remain absolutely vital to the protection of individual liberty.

The Act requires Congress to surrender too much of its constitutionally conferred discretion to formulate national policy pursuant to the Spending Power. This abdication of one of its primary legislative functions severely weakens the ability of Congress to fulfill its proper role in our tripartite system of government, and hinders the right of affected citizens to seek redress through the electoral process.

A. *The Necessity of Reconciling the Practical Requirements of Our System of Government with the Principles of Dispersement of Sovereign Authority and Electoral Accountability That Underlie the Delegation Doctrine.*

1. The Inadequacy of the "Legislative Standards" Test Alone for Guarding Against Excessive Delegations of Congressional Power.

In delegating power to an administrative entity, this Court has stated that Congress must provide an "intelligible principle," *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928), or "legislative standards," *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 530 (1935), in order to guide the agency's course of conduct. If Congress has sufficiently articulated a substantive choice of policy so as to limit tightly the delegate agency's discretion in choosing ends, then the legislative decision to grant broad powers of implementation to that agency will not be disturbed. *J.W. Hampton, supra* at 407-408.

These judicial tests, as currently applied, no longer effectively protect the separation of powers principles that underlie

the delegation doctrine. *See* McGowen, Congress, Court, and Control of Delegated Power, 77 Colum. L. Rev. 1119, 1127-1131 (1977); Ely, Democracy and Distrust, 131-134 (1980); *Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U.S. 607, 672-685 (1980) (Opinion of Rehnquist, J.). One commentator has noted, "Although [a] wide range of opinions employs the same words, the opinions differ in nuance and differ widely in how they would apply the doctrine. The test has become so ephemeral and elastic as to lose its meaning. . ." Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1231 (1985).

The primary difficulty with the "legislative standards" test lies in its restricted focus — the only aspect of the delegation that receives attention is the amount of power received by the administrative agency. In view of the recognized need to permit agency latitude in choosing the means of statutory implementation, especially where difficult technical questions exist, or where the sheer scope of a substantive field requires far greater oversight than Congress may effectively handle, courts have been reluctant to place restrictions on this end of the transfer of power. *See e.g., Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933); Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1695 (1975). As a result, this one dimensional approach creates the impression of an "all or nothing" dilemma confronting the judiciary, suggesting that a strict application of the delegation doctrine would demand the dismantling of the administrative system of government. *See* Schoenbrod, *supra* at 1227 (arguing that this conflict "is only apparent").

A broader methodology is needed, one which would require little retreat from previous decisions while safeguarding important separation of powers concerns, thus allowing this Court to invalidate egregious examples of Congressional abdication of responsibility without necessitating a massive restructuring of the modern administrative state.[6]

[6] *See* Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575, 582 (1972) ("To be sure, we can all join in rejecting broad formulations of the doctrine [limiting delegation] . . . But one can reject this extreme position without conceding that Congress should be permitted, in effect, to vote itself out of business.")

2. The Need for Explicit Recognition of a Complementary Strand of the Delegation Doctrine That Looks to the Power Surrendered by Congress in Addition to the Power Conferred Upon the Delegate Agency.

(a) The Delegation Doctrine Requires Judicial Inquiry into Both Sides of A Transfer of Congressional Power.

Two fundamental separation of powers principles underlie the delegation doctrine: the concern for governmental accountability to those who are governed and the desire to keep sovereign power dispersed throughout the different branches of our government in order to maintain our system's checks and balances. *Arizona* v. *California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting); Wright, *Beyond Discretionary Justice*, *supra* at 585; Tribe, *supra* at 276 (1978). A delegation of Congressional power that confers actual discretion upon non-elected agency officials to choose substantive ends threatens these values. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935); *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 340-342 (1974). A similar threat arises when our elected representatives delegate power in such a manner as to avoid the exercise of their own discretion, even when the delegation confers no improper authority upon the delegatee. *American Petroleum Inst.*, *supra* at 685-687 (Opinion of Rehnquist, J.); Ely, *supra* at 132.

The district court pointed out that the "legislative standards" test is concerned exclusively with the degree to which the delegation confers the discretion to make substantive policy decisions upon non-elected administrative officials. J.A. 47. This test, however, examines only one half of the transfer of Congressional power. Even if this test can be satisfied, the judicial inquiry pursuant to the delegation doctrine should not end there. There exists a second strand within the delegation doctrine, one implicitly utilized though never explicitly recognized by this Court. This complementary strand asks a different but equally critical question: to what degree has Congress surrendered its own discretion to act pursuant to a particular legislative power?

Both delegation concerns trace back to *Schechter Poultry*. The traditional strand of the delegation doctrine, as stated, focuses on the power actually received by the executive or independent agency that serves as the delegatee. The primary inquiry is whether the substantive policy choices have been made by Congress and left to the agency for execution, or whether the delegation actually vests the agency with legislative discretion. "[W]e look [to see] whether Congress . . . has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others." *Schechter Poultry*, 295 U.S. at 530.

The second strand of the delegation doctrine has its genesis in Justice Cardozo's concurring opinion in *Schechter Poultry*, in which he looked to the power Congress had actually surrendered. The delegation at issue in *Schechter Poultry* extended, in Justice Cardozo's view, to the entire breadth of Congress' power to regulate industry under the Commerce Clause. *Id.* at 553. Justice Cardozo strongly objected to the transfer by Congress of a power *en gross*: "This is delegation running riot. No such plenitude of power is susceptible of transfer." *Id.*

Congressional abdication of its duties, either through the failure to make politically difficult choices, or by refusing to exercise one of its fundamental powers, and the foisting of those duties on non-accountable agencies, raises questions that cut to the core of our system of government. *See generally*, Tribe, *supra* at 286-287.[7]

This Court has in recent years reaffirmed the importance of separation of powers principles in our constitutional system. *See Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Chadha*, *supra*. The considerations that required the invalidation of the legislative veto in *Chadha* strongly support, if not mandate, the articulation by this Court of a new approach to problems raised by

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[7] "[By] refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic. . . .

There can be little point in worrying about the distribution of the franchise and other personal political rights unless the important policy choices are being made by elected officials." Ely, Democracy and Distrust, 132-133 (1980).

Congressional delegation of power. *See*, Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 Harv. J. on Legis. 1, 17 (1984) (disagreeing with *Chadha* but admitting its logic if it represents a trend towards "a significant judicial tightening of the limits within which Congress may entrust *anyone* with lawmaking power.") (emphasis in original). *See also* Goldsmith, *Immigration & Naturalization Service* v. *Chadha And The Nondelegation Doctrine: A Speculation*, 35 Syracuse L. Rev. 749, 754 (1984) (describing a stricter view of the delegation doctrine as the implicit "linchpin" of the *Chadha* decision). The two strand view of the delegation doctrine offers an analysis sensitive to separation of powers requirements, yet cognizant of the difficulties and needs of effective execution of legislative enactments.

The need for a stricter judicial approach to Congressional delegations has been recognized across the legal spectrum. *See, e.g., American Textile Manufacturers Inst.* v. *Donovan*, 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting); Ely, *supra* at 133; Wright, *supra* at 582-587; Schoenbrod, *supra* at 1228-1237. Explicit recognition by this Court of two interrelated strands of delegation concerns would help provide a framework for the development of this approach.

(b) The "Power Surrendered" Strand of the Delegation Doctrine, by Focusing on the Institutional Role of Congress Rather Than on the Administrative Agency, Protects the Separation of Powers Principles That Underlie the Doctrine in a Manner That the "Legislative Standards" Strand Alone Cannot.

If the separation of powers means anything, it assumes that within each branch of government there exists certain powers that are endemic to the proper functioning of that branch. *See* generally, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (Executive usurpation of a legislative function); *Buckley, supra* (legislative usurpation of an executive function). *See also, Chadha*, 462 U.S. at 951 ("[T]he powers delegated to the three branches are *functionally identifiable*.") (emphasis added). The "power surrendered" strand of the del-

egation doctrine protects the underlying separation of powers principles by preventing Congress from surrendering its ability to legislate pursuant to one of its "functionally identifiable" powers. At the same time, the requirement that the legislative "power surrendered" fall within the range of "functionally identifiable" powers in order to be invalidated ensures that only exceptionally egregious Congressional delegations of power will be disturbed.

The Act contemplates nothing less than a complete surrender of the Spending Power, a power specifically entrusted in the Constitution to the legislative branch of our government. In addition to evaluating the legislative standards provided in the Act, this Court should explicitly address the question raised by Justice Cardozo in his *Schechter Poultry* concurrence: may this "plenitude of power" be delegated?

This second strand of the delegation doctrine was implicitly recognized in *National Cable Television Ass'n* v. *United States*, wherein this Court stated, "Taxation is a legislative function, and Congress [is] the sole organ for levying taxes," 415 U.S. at 340. Although the statute at issue in that case was construed narrowly, making it unnecessary to face the delegation question directly, the Court made clear that its reasoning was guided by the view that, "[i]t would be [a] sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power. . ." *Id.* at 341.[8]

The question set aside in *National Cable Television Ass'n* in regard to the Taxing Power must now be faced in regard to the Spending Power. "[The] power over the purse [may] be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people . . . for carrying into effect every just and salutory measure." Madison, The Federalist 58 (Van Doren ed. 1945). The Commerce Power (*Schechter Poultry*), the Taxing Power (*National Cable Television Ass'n*) and the Spending Power,

[8] "*National Cable Television Ass'n* v. *United States* . . . reflected some continuing vitality in that aspect of the nondelegation doctrine that safeguarded against a wholesale surrender by Congress of its legislative powers." Goldsmith, *supra* at 754-755 (citations and footnotes omitted).

powers placed within the purview of our legislative branch of government under Art. I of the Constitution, all represent a "functionally identifiable" segment of Congressional authority. This Court must not countenance the delegation of such "plenitude of power" as contemplated by the Act. Any policy decision made pursuant to such powers constitutes "a 'quintessential legislative' choice [that] must be made by the elected representatives of the people, not by non-elected officials. . . ." *American Textile Manufacturers Inst.*, 452 U.S. at 547 (Rehnquist, J., dissenting).

The district court rejected the argument that there exist certain core functions (or functionally identifiable powers) within the legislative branch that are nondelegable *per se*. J.A. 43.[9] The "per se nondelegability" label, however, obscures the separation of powers concerns that require judicial scrutiny of Congressional delegations of authority. The "power surrendered" approach does not pose an absolute bar to Congressional delegations of core functions such as the taxing and spending powers, but instead prohibits Congress from relinquishing its own discretion to make the final substantive policy choice in the exercise of one of those core functions.[10] The two strands of the delegation doctrine together ensure that ultimate policy decisions may be traced directly back to Congress so that the

[9] The district court's suggestion that there exists no basis for a qualitative distinction between different legislative functions ignores a line of precedent that stretches back to *McCulloch* v. *Maryland*, 17 U.S. 316, 407-411 (1819), in which Chief Justice Marshall took great pains to explain the difference between "the great powers . . . [of the] sword and the purse," that directly appertain to government sovereignty, which could not be exercised if not expressly granted by the Constitution, and such incidental powers, such as creating a corporation, which could be implied as a necessary means for executing the primary powers. Such a distinction, for example, underlies the epigram, "The power to tax is the power to destroy." *Cf. National Cable Television Ass'n*, 415 U.S. at 341 (citing *Panhandle Oil Co.* v. *Mississippi*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting)).

[10] The district court's reliance upon *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928), to refute the contention that legislative functions are not qualitatively distinguishable, is misplaced. J.A. 43-46. This Court in *National Cable Television Ass'n* distinguished *Hampton* from the type of delegation of the taxing power that a broad reading of the statute in the later case would have contemplated.

systemic balance between Congress and the two other branches of government may be maintained.

(c) The Act Represents a Surrender by Congress of One of its "Functionally Identifiable" Powers, and Thus Threatens Both Electoral Accountability and the Dispersement of Sovereign Authority.

Under the Act, Congress divests itself of its power to control spending and places this authority in the hands of three separate agencies. Whether or not the complicated statutory formula with which these agencies must comply satisfies the minimal requirements of the "legislative standards" strand of the delegation doctrine, the Act must be held unconstitutional. Never before in this country's history has Congress relinquished so much control over the running of the nation.[11] No federal statute has ever worked to remove direct accountability to the electorate to the extent of the Act.[12] This Court should not sanction a surrender of power by Congress of the nature and magnitude contemplated by the Act.

The Senators and House Members who enacted this law may now contend that they have made the "hard choices" by commanding that the Federal budget achieve equilibrium by 1991. But who will take responsibility for the Draconian effects of the Act's allegedly "automatic" budget excisions, made through a sequestration process that has been described as a "meat ax?" 131 Cong. Rec. S17404 (December 11, 1985) (Statement of Sen. Glenn). The Act locks this Nation into a

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[11] An article in the New York Times, February 21, 1986, aptly describes the frustrations of members of Congress as they realize their inability to provide necessary funds for the Library of Congress. *New York Times*, February 21, 1986 at A20.

[12] "'If there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, *somebody must be trusted*, in order that when things go wrong it may be quite plain who should be punished . . . *Power and strict accountability of its use* are the essential constituents of good government.'" Levi, *Some Aspects of Separation of Powers*, 76 Columbia L. Rev. 371, 380 (1976) (quoting W. Wilson, Congressional Government: A Study in American Politics (Meridien Books ed., 1956)) (emphasis in original).

government by economic alchemy. When the necessary cuts are ordered by the President, pursuant to the report of the Comptroller General, from whom shall affected citizens seek redress? Who will be held accountable if "automatic" budget cuts are required to meet the deficit target set for Fiscal Year 1989, pursuant to a law passed in 1985? The Act presents the ultimate "legislative mirage," *American Petroleum Institute*, 448 U.S. at 681 (Opinion of Rehnquist, J.), holding forth the imagined oasis of a balanced budget, while direct responsibility for the various budget cuts required to achieve that goal lies buried in the political sand.[13]

B. *The Act Denies to All Citizens the Salutory Benefits of the Legislative Process.*

In *Chadha*, this Court took a major step towards rectifying a law-making process that was "stand[ing] the Constitution on its head. . ., H.R. Rep. 95-105, 95th Cong. 1st Sess., *reprinted in* 1 U.S. Cong. & Ad. News, 41, 53 (1977) (statement of Phillip Kurland). Prior to *Chadha*, it had become routine for Congress to delegate broad authority to executive and independent agencies, subject to the control of One-House review, thus "putting the lawmaking power in the President and the veto power in Congress." *Id.*

In the instant case, as in *Chadha*, respect for the procedural structure of government, not for its own sake, but for the sake of advancing individual liberty, dictates that Congress may

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[13] [An] objection to the nondelegation doctrine that is more often billed as dispositive, [is] that it often will not be politically convenient for legislators to resolve issues of policy. The point is one that has been reiterated, but never more succinctly than it was recently by Richard Stewart. "Individual politicians often find far more to be lost than gained in taking a readily identifiable stand on a controversial issue of social or economic policy." It's an argument, all right, but for which side? That legislators often find it convenient to escape accountability is precisely the reason *for* a nondelegation doctrine. Were it to turn out that legislators forced to govern wouldn't have the courage to do so energetically, that would often be too bad . . . but at least it would be our system.

Ely, *supra* at 133 (emphasis in original) (citation omitted).

not take shortcuts that can serve to shield individual members from possible voter retribution, especially when there exists no practical necessity or justification other than political convenience. No one denies the magnitude of the problem caused by the current Federal budget deficit. But clearly, the argument that the problem has exceeded the ability of Congress to deal with it runs contrary to the most basic principles upon which our system of government rests.[14] All the necessary means to control the deficit currently lie within Congressional control, through power to raise revenues and control spending.

Supporters of the Act contend, however, that Congress cannot do its job anymore, and that only by creating a statutory "sword of Damocles" will Congress find the impetus to make genuine progress towards resolving the current crisis — a sword that will blindly slash if Congress fails to act. *See* 131 Cong. Rec. S17401 (December 11, 1985) (Statement of Sen. Gorton). This is an argument for expediency and efficiency at the expense of deliberation and compromise, for a quick-fix treatment of the symptom rather than a well-reasoned attack at the disease. "No doubt a government with distributed authority . . . labors under restrictions from which other governments are free. It has not been our tradition to envy such governments." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 613 (Frankfurter, J., concurring). Congress has all the impetus it needs to act on the budget; the fact that its decisions may carry political costs only strengthens the Constitutional requirement that Congress not abdicate its responsibilities, and that each Senator and Representative stand up and be counted.

The "automatic" triggering mechanism mandated by the Act, like the legislative veto invalidated in *Chadha*, is "in many

[14] *See, e.g.*, L. Tribe, American Constitutional Law, § 5-17 at 286 (1978):

> [L]imits on Congressional capacity to delegate responsibility derive from the implicit constitutional requirements of consensual government under law. Under any theory that finds legitimacy in the supposed consent of the governed within a framework of constitutional limitations, the cooperative exercise of accountable power presupposes the possibility of tracing every such exercise to a choice made by one of the "representative" branches, a choice for which someone can be held both politically and legally responsible.

respects a convenient shortcut; . . . but it is crystal clear . . . that the Framers ranked other values higher than efficiency." *Chadha*, 462 U.S. at 958-959. This represents the most fundamental aspect of our democratic system. Our legislative process was not designed to operate in a vacuum, but instead our Congressmen are expected to seek out and consider the differing views of their constituents and other interested parties. The process also calls for the careful study and consideration of each item of proposed legislation. What emerges in the end is neither intended to be perfect, nor to satisfy all affected. It is intended, however, to represent the widest range of opinions possible, and show signs of deliberate evaluation from among competing choices.[15]

To illustrate how our legislative process functions in the manner envisioned by the Framers, the *amicus* respectfully directs this Court's attention to H.R. 3700, The Higher Education Amendments of 1985, legislation of immense concern to Mr. Blankstein and the students he serves. H.R. 3700 passed the House by a vote of 350-67. 131 Cong. Rec. H10803 (December 4, 1985). The Senate is now considering its own version of the reauthorization, S. 1965, 99th Cong., 1st Sess. (1985).

The bill seeks "to reaffirm and improve the federal commitment to the support of postsecondary education." H.R. Rep.

[15] Consider the words of Judge Scalia, a member of the three-judge district court panel that expressly rejected the delegation argument in this case. In 1977, several years before his appointment to the Federal bench, Mr. Scalia eloquently testified before the House Committee on Government Operations on the systematic dangers of legislation that contained excessive delegation of Congressional power combined with the now unconstitutional legislative veto:

> [The] delay inherent in the bicameral legislative process; the lobbying pressure from groups proximately affected; the political cost of casting a vote one way or another on controversial substantive issues; all these are not incidental obstructions to the governmental process which the Founding Fathers simply did not envision, or were not clever enough to eliminate. They are an essential and indispensable part of our representative democracy. Their elimination is an abdication by the Congress of its constitutionally assigned responsibilities and a usurption, by the Congress and the Executive acting in concert, of a legislative power not accorded to them by the people.

H.R. Rep. 95-105, 95th Cong. 1st Sess. (1977), *reprinted in* 1 U.S. Cong. & Adm. News 41, 52 (1977) (Statement of Antonin Scalia).

99-383, 99th Cong. 1st Sess. 4 (November 20, 1985). Well aware that the current amendments to the original Higher Education Act of 1965 were scheduled to expire at the end of fiscal year 1986, Congress in February, 1985 undertook a comprehensive review of existing student financial assistance programs, taking into full account both the needs of the Act's various program beneficiaries, and the realities of the budgetary limitations currently facing the country.

The Subcommittee on Postsecondary Education of the House Education and Labor Committee held no less than 35 hearings, including twelve outside of Washington, D.C. More than one hundred institutions, organizations, associations and governmental bodies, including the *amicus*, submitted legislative recommendations. The current provisions of the Higher Education Act were examined on a line by line basis with particular emphasis on the effect of budgetary restraints on the operation of the programs. Testimony was taken at the hearings from 352 witnesses, representing a broad cross section of educational experts, teachers, administrators, and, of course, students. Based on testimony and information collected at these hearings, the Subcommittee drafted and presented a bill to the full Committee. The Committee approved the bill by an overwhelming and bipartisan vote of 28-2, and from there it passed in the House by the margin indicated above. In the words of the Chairman of the Subcommittee on Postsecondary Education, H.R. 3700 "represents a continuation of the long . . . tradition of bipartisan higher education legislation." 131 Cong. Rec. H10599 (December 3, 1985) (remarks by Rep. Ford).

H.R. 3700 represents an exhaustive and detailed approach to an issue of national concern. Each House Member's vote on H.R. 3700 was recorded and published in the Congressional Record. 131 Cong. Rec. H10803 (December 4, 1985). The bill contains hundreds of individual policy choices made in an open and accountable process in which all interested parties had an opportunity to participate. However, if the Act stands, the time and effort devoted to the reauthorization of the Higher Education Act may be rendered meaningless: unaccountable agency officials will, solely on the basis of economic forecasts,

be ermitted to reverse Congressional policy choices by a pr dure that is entirely insulated from public input.

ne may extrapolate the example of H.R. 3700 to countless sim r situations in which Congress has meticulously examined . id responded to a situation that called for legislative remed . In all these cases, the effort made to hear the testimony of concerned parties, to gather expert witnesses, to strike a painstaking balance between the perceived monetary need and the inevitable budgetary constraints, will now just be so much grist for the CBO-OMB-GAO millstone.

As one observer has noted, "If that is what the Framers intended, it is a puzzle why we even bother with elections." 131 Cong. Rec. S17408 (Statement of Sen. Riegle) (December 11, 1985) (quoting Broder. The "Rudman-Gramm Balanced Budget Sham," The Washington Post, December 11, 1985).[16]

Congress has abandoned the budget process. There will be no balancing of merits, no hearings for effected parties to air their viewpoints, and no direct accountability for the required excissions. Congressional willingness to seek out and consider differing viewpoints and carefully weigh the effects of proposed legislation as was shown in H.R. 3700, stands as the mark of our democratic process at its best; the budget cutting mechanism of the Act displays our process at its worst.[17]

C. *The Delegation Contemplated by the Act Fails to Satisfy Even the Traditional "Legislative Standards" Test for Measuring Whether Congress Has Sufficiently Limited Agency Discretion.*

The Act cannot survive even the mildest application of the traditional strand of the delegation doctrine; the legislative

[16] "The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[17] "I have often wondered in the past two months how Thomas Jefferson or James Madison would have reacted to this proposal. I believe they would have rejected the basic concept on its face. They foresaw a country governed by human judgment, not one that is subjected to the straitjacket of automatic formulas and computer printouts." 131 Cong. Rec. S17443 (December 11, 1985) (Statement of Sen. Byrd).

standards contained therein are wholly illusory. The Act vests what CBO Director Rudolph Penner has described as "really a cosmic amount" of decision-making in unelected officials. 131 Cong. Rec. S17404 (December 11, 1985) (Statement of Sen. Glenn).

The Act instructs the Directors of the CBO and the OMB to estimate the anticipated "budget base levels of total revenues and budget outlays," for each fiscal year between 1986 and 1991, in order to determine whether the projected deficit will fall within the target level for that year, as set forth in § 201(a)(1). Act § 251(a)(1); J.A. 103, 104, 109. The estimates as to revenues and outlays thus constitute the crucial aspects of the Act's formula, since the Comptroller General's decision as to whether to sequester, and by how much, stems almost entirely from these projections.

The district court held that the Act contains constitutionally adequate legislated standards to guide the agencies in predicting budget deficits. J.A. 50. However, the district court ignored the irrefutable point that the final estimates for determining the budget outlays and total revenues ultimately depend on several economic factors that are both inherently unascertainable and subject to political influences. No matter how well Congress may instruct CBO and OMB as to existing and previous expenditures, it can no more control estimates of future economic conditions than it can predict the weather.[18] These future conditions include Real G.N.P. growth rate, unemployment, inflation, and interest rates. The district court held that "the economic calculation standards, which might seem vague and confusing to laymen, will have more precise meaning to officials accustomed to making such determinations." *Id.* A brief examination of how these "economic calculation standards" have affected the Government budget process in previous years demonstrates the groundlessness of this reasoning.

[18] "This bill places naive faith in the science of economics . . . Under this bill, billions and billions of dollars can be excised from the budget if the Government's economic forecasts show that the budget will miss the Gramm-Rudman targets . . . [I] ask, are we really going to trust our economy to some econometric equations that were never meant to deal with this kind of policy-making?" 131 Cong. Rec. S17405 (December 11, 1985) (Statement of Sen. Glenn).

In the GAO Report, one section was devoted to an explanation of the economic assumptions used in the budget calculations. 51 Fed. Reg. 2847. Table B-2 of that section, entitled "History of Forecast Errors, 1980-85," details the inaccuracies of both CBO and OMB in their budget forecasts over the previous six years, along with those of three private sector forecasting firms and two survey reports. *Id.* at 2850-2852.

The figures, reported as the difference between the predicted and the actual percentage points, speak for themselves.[19] Looking first at the Real G.N.P. growth rate, each of the seven forecasters erred by an average of over one percentage point for each year. OMB displayed the greatest total average differential, 1.7 percentage points. Wharton Econometric Forecasting Associates ("Wharton") displayed the greatest accuracy, at 1.2 percentage points. *Id.* at 2850. For inflation, the Comptroller General indicated that the seven forecasting groups all erred at a rate between 1.3 percentage points (Wharton) and 0.9 (CBO). *Id.* at 2851. For unemployment, all were virtually even in the range of error, from the American Statistical Association and National Bureau of Economic Research (ASA/NBER) average of 0.7, to the CBO total mean error of 0.5 of a percentage point. *Id.* CBO showed an average error of 1.3 percentage points for three month Treasury Bill interest rates, while OMB displayed the greatest accuracy in this area, with an error at 0.8. *Id.* at 2852.[20]

The ramifications of these marked differences between the predictions and the actual figures on the budget process are illustrated in the President's Budget Message for Fiscal Year 1987. H.R. Doc. No. 143, Office of Management and Budget, Budget of the United States Government: Fiscal Year 1987, 99th Cong., 2d Sess. (1986) ("Budget for FY 1987"). ("[The

[19] The Comptroller General saw fit to comment, "Forecast errors tend to result from developments that few if any forecasters anticipated, causing forecasts generally to err in the same direction . . . This result is more likely a reflection of the particular events occurring in those six years than it is a reflection of an underlying bias in all sources' forecasting techniques." *Id.* at 2853.

[20] Ironically, OMB's success stemmed from a period during which it did not actually forecast interest rates, but merely assumed that interest rates would fluctuate with the projected rate of inflation. 51 Fed. Reg. 2853, n.3.

sensitivity of the Budget to economic assumptions] seriously complicates budget planning because the inevitable errors in forecasting the performance of the economy lead to errors in the budget forecast." *Id.* at 2-28). Under the President's economic assumptions of February 1985, total outlays for fiscal year 1986 were estimated at $983.7 billion, while total receipts were estimated at $798.1 billion, for a total deficit of $185.6 billion. Due to forecast errors, however, total receipts are now guessed to add up to $21 billion less than anticipated, while total outlays will decrease by only $3.8 billion, thus adding an additional and wholly unanticipated $17.2 billion onto the federal deficit for fiscal year 1986. *Id.* Under the Act, the total of the required reductions in spending for fiscal year 1986 is $11.7 billion. 51 Fed. Reg. 2860. An appreciation of the history of forecast errors leads one to the conclusion that the only way to calculate the deficit for any given fiscal year is from a position of hindsight.

How great a forecasting error will it take to cause a massive effect on spending under the Act? No more than a one (1) percentage point differential between the estimated and the actual figures, which, as shown in the Comptroller General's report and outlined above, constitutes about the average total mean error for each of the seven government and private forecasting group's estimations of the key economic conditions. 51 Fed. Reg. 2849. A sustained one percentage point lower Real G.N.P. growth, for example, beginning October 1986, will decrease total receipts (and thus increase the deficit) by an estimated $6.2 billion for fiscal year 1987, $17.7 billion for fiscal year 1988, $30.5 billion for fiscal year 1989, $44.7 billion for fiscal year 1990, and $60.6 billion for fiscal year 1991. Budget for FY 1987, *supra* at 2-29.

What are the chances that a lower growth rate than predicted will actually occur? Consider the estimates for fiscal year 1986 in the Budget for FY 1987, alongside the comparison of current economic forecasts set forth by the Comptroller General. The President's budget for fiscal year 1986 assumed a 3.4% growth rate in Real G.N.P. *Id.* at 2-24. Since that time, according to the GAO Report, OMB, which supplies the estimates for the

President's budget, has revised its forecast up to 3.5%, while CBO has issued a forecast of 3.0%. 51 Fed. Reg. 2848. No other economic forecast cited by the Comptroller General estimates Real G.N.P. growth in excess of 2.9%. *Id.* at 2854. Breaking down the annual rate of growth by quarters, the Comptroller General's report shows a disparity for the first quarter of 1986 reaching from OMB's high of 4.0%, down to the Data Resources, Inc. prediction of *minus* 0.6% growth. *Id.* at 2855.

Real G.N.P. growth is the crucial economic indicator in budget forecasting, insofar as all revenue estimates derive from the predicted rate of national economic expansion. *Id.* at 2857-2858. For this reason, predictions of this indicator are most susceptible to the influence of political convenience. OMB, as an arm of the Executive, has long been known to offer the rosiest picture of the upcoming economy that it could reasonably put forth. OMB predictions of Real G.N.P. are consistently higher than that of CBO or of any of the five other private forecasts set out in the GAO Report. 51 Fed. Reg. 2855. Such behavior has its dangers when these forecasts are used in their intended fashion, which is to influence Congressional spending decisions. It can be catastrophic now, if the OMB predictions (averaged together with CBO's) are permitted to ultimately determine Government spending under the Act.

All of this clearly demonstrates the utter futility of any Congressional attempts to infuse any meaningful "legislative standards" to guide or control OMB, CBO, and GAO in their budgetary calculations. Even assuming common understanding on the meaning of crucial terms of the Act, such as "real economic growth," forecasting the economy remains too uncertain. Defining "real economic growth," as the Act purports to do in § 257(6), J.A. 161, means little, when economists of equal skill and judgment will invariably reach different conclusions as to what it will be for any given year. Even when the experts generally agree, unanimity never occurs and all predictions ultimately fail to some degree.

All of this data supports the powerful point succinctly made by Rudolph Penner, in his testimony before a House Subcom-

mittee during the only hearing held in either chamber on the ramifications of the Act. Speaking to the dangers of shackeling this country's economic policy to the vicissitudes of economic forecasting, he stated:

> We have to make a large number of more or less arbitrary choices, and substantial errors are possible. . . . We might trigger a sequester when subsequent events show that it was unnecessary. . . It is hard to think of other instances where unelected officials have such power to do good or evil.

Hearing at 157 (Testimony of Rudolph Penner, Director, CBO).

Upon the calculations of the Comptroller General, based on the CBO/OMB report, rest the reversal of thousands of individual spending decisions carefully made by Congress pursuant to its specifically enumerated powers under Article I. There exists no way that Congress can provide any standards that will reduce the inevitable risk of error. The notion that so many people will be affected by the economic estimates and predictions of the unelected officials employed by OMB, CBO, and GAO, well-intentioned but inevitably subject to the limitations inherent in economic forecasting, flies in the face of the values served by our Republican form of government.

Justice Brandeis once wrote,

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, *to save the people from autocracy*.

Myers v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (emphasis added).

Such autocracy has arrived, in the form of government by economic alchemy. If the principles of dispersement of sovereign power and governmental accountability remain worthy of protection, this Court should not hesitate to utilize the delegation doctrine, and hold the Act invalid.

Conclusion

For the reasons stated, the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177 should be declared unconstitutional on its face.

Respectfully submitted,

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